

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TEXAS EASTERN TRANSMISSION LP : CIVIL ACTION
:
v. :
:
WILLIAM BOWERS III and :
CAROL S. BOWERS : NO. 01-4488

MEMORANDUM

Padova, J.

January , 2002

Before the Court is Plaintiff's Complaint for a permanent injunction¹ concerning an easement for two natural gas pipelines. Plaintiff, Texas Eastern Transmission LP ("Texas Eastern"), owner of the easement, seeks to permanently enjoin defendants, William Bowers III and Carol S. Bowers ("Bowers"), from interfering with or obstructing Texas Eastern's use of its easement through the Bowers' servient property and asks that the ambiguously described easement include a total area eighty-eight and one-half (88.5) feet wide, which would include twenty-five feet on each side of its two pipelines.

The Court held a hearing for permanent injunction ("hearing") on December 19, 2001. For the reasons discussed below, the Court will grant a permanent injunction defining the easement to an area 88.5 feet wide, which includes 25 feet on each side of each pipeline, subject to the existing encroachments of the mature oak

¹Texas Eastern's Motion for Preliminary Injunction was denied after a hearing and bench adjudication on October 17, 2001.

tree ("subject tree"), which shall remain undisturbed, part of the Bowers' house and part of their swimming pool.²

I. Factual Background³

Plaintiff Texas Eastern is a Delaware partnership, duly registered to do business in the Commonwealth of Pennsylvania, with its principal place of business in Houston, Texas. Texas Eastern owns and operates interstate natural gas pipelines pursuant to certificates of public convenience and necessity issued by the Federal Energy Regulatory Commission (or its predecessor, the Federal Power Commission).

Defendants William Bowers III and Carol S. Bowers, husband and wife, reside at 2066 Dutton Mill Road, Newtown Square, Chester County, Pennsylvania (the "subject property"). The Bowers purchased the subject property in 1963 and are the record owners. A house and swimming pool have been constructed on the property.

Texas Eastern is the successor grantee, under deed dated February 19, 1943, of a right of way and easement to "lay, operate, renew, alter, inspect and maintain" one or more pipelines across

²By joint stipulation, the parties agreed that the existing encroachments of part of the Bowers' house and part of their swimming pool could remain.

³The parties submitted a stipulated factual record in preparation for the hearing, which the Court adopted as its findings of fact for the hearing. The Court's recitation of the factual background is based on the parties' submission.

the subject property, for the transportation of natural gas (the "Grant"). The Grant fails to define a specific width for Texas Eastern's easement. The Grant requires grantee (Texas Eastern) to make reparations to the grantor for damages to crops, fences, timber and land that may be suffered from the construction, operation, removal, alteration, inspection or maintenance of the pipelines.

Pursuant to the Grant, two parallel twenty-inch high-pressure natural gas pipelines, known as lines 1A and 1H, were constructed across the subject property prior to the Bowers' purchase of the property. The two pipelines are separated by a distance of thirty-eight and one half (38.5) feet. An ExxonMobil pipeline is located within the easement and between the two Texas Eastern pipelines.

The subject property was conveyed to the Bowers subject to the terms of the Grant, by whose terms the parties are bound.

Since the mid-1960s, the Bowers have continuously cultivated their gardens and planted and maintained trees within Texas Eastern's right-of-way. Texas Eastern never required, or requested, that the Bowers remove any trees until December 2000, and Texas Eastern never trimmed or removed trees on the Bowers' property. Of particular concern to the Bowers is the possible removal of the subject tree within the proposed 88.5-foot-wide easement. The Bowers want this tree left undisturbed.

Texas Eastern must be able to readily locate and gain access to the pipelines, inspect the lines, and take all steps necessary to permit the early detection of leaks, in order to facilitate the rapid taking of corrective actions. Operation and maintenance of Texas Eastern's pipelines requires that routine inspections be performed by Texas Eastern personnel and that access to the easement not be restricted or obstructed by the landowner.

Texas Eastern conducts aerial surveys two or three times per week to facilitate early detection of pipeline leaks and to promptly identify any physical changes to the property (such as encroachments, excavation or construction activities) that have the potential to adversely affect its pipelines. Pipeline gas leaks can produce ruptures that may have catastrophic consequences.

Due to the size of the entire area through which Texas Eastern's pipelines pass, Texas Eastern views it as economically impractical for it to perform frequent walk-through inspections. To conduct an aerial survey, Texas Eastern's pilot must have a clear view of the entire width of any given right-of-way, when seen from the side of the airplane.

Texas Eastern filed this instant action after it advised the Bowers of its intention to clear the subject easement of trees, shrubs, limbs and any other possible obstructions. At the preliminary injunction hearing held on October 17, 2001, the Bowers conceded that Texas Eastern is permitted by the Grant to remove

trees, mow, and otherwise clear, and to keep clear, a fifty-foot-wide corridor through the center of the right-of-way. Such clearing was completed prior to the hearing for permanent injunction.

II. Legal Standards

This Court has jurisdiction based on complete diversity pursuant to 28 U.S.C. § 1332.⁴

Before a permanent injunction may be issued, a plaintiff must establish that "(1) the court's exercise of equity jurisdiction is proper; (2) plaintiff has actually succeeded on the merits of its claims; and (3) the balance of the equities tips in favor of injunctive relief." Northeast Women's Center, Inc. v. McMonagle, 745 F. Supp. 1082, 1085 (E.D. Pa. 1990) (citation omitted). Equity jurisdiction is proper if: (1) the plaintiff has no adequate remedy at law; (2) the threatened injury is real, not imagined; and (3) no equitable defenses preclude jurisdiction. See id.; see also Apex Fountain Sales, Inc. v. Flo Aire, Inc., C.A.No. 83-6153, 1993 U.S. Dist. LEXIS 16426, at *2 (E.D. Pa. Nov. 10, 1993) (citing Northeast Women's Center, 745 F. Supp. at 1085).

III. Discussion

The central issue in this litigation is the extent of the dimensions of the easement. The easement at issue provides for the operation, alteration, renewal, inspection and maintenance of the

⁴Because jurisdiction is based on complete diversity, the Court does not reach the issue of federal question jurisdiction.

pipelines, but fails to include any dimensions of the easement. Texas Eastern argues that it needs a minimum 25-foot-wide area on each side of its two pipelines to properly and safely inspect, maintain and repair them. The Bowers contend that Texas Eastern fails to meet the requirements for permanent injunction for such a width, and assert, in particular, that the subject tree existing within the proposed width does not have to be removed for the inspection, maintenance and repair of the pipelines.

Under Pennsylvania law, the holder of a geographically undefined easement, like the one here, is given such rights "as are necessary for the reasonable and proper enjoyment of the thing granted." Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920, 924 (Pa. 1995) (citations omitted). See also Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538 (3d Cir. 1995) (citing Zettlemoyer); Texas Eastern Transmission Corp. v. Grassi, 1992 WL 172594, at *4 (E.D. Pa. July 12, 1992) (citing Lease v. Doll, 403 A.2d 558 (Pa. 1979)). This Court has previously noted, "[t]he use, the available technology, the lay of the land, and many other factors make a blanket rule for the width of an undefined easement untenable." See Grassi, 1992 WL 172594, at *6.

In determining the dimensions of ambiguous grants for natural gas pipeline easements, courts have held that twenty-five feet to each side of the pipeline is "reasonable and necessary" to operate a twenty-inch pipeline. See, e.g., Tarbuck, 62 F.3d at 544 (finding

that the evidence confirmed that a total of fifty feet is the reasonable and necessary width needed to operate a twenty-inch gas pipeline) (citing Columbia Gas Transmission Corp. v. Large, 619 N.E.2d 1215 (Ohio 1992) (finding fifty feet to be the appropriate width); Roebuck v. Columbia Gas Transmission Corp., 386 N.E.2d 1363 (Ohio App. 1977) (same)). Cf. Columbia Gas Transmission Corp. v. Savage, 863 F. Supp. 198, 202 (M.D. Pa. 1994) (finding total area of 50 feet is necessary for easement over 14-inch pipeline).

At the hearing, Texas Eastern's expert witness in pipeline construction and safety, Edward J. Murphy, division manager of the pipeline construction firm Henkels & McCoy, testified that the minimum safe distance required for operation of pipeline replacement equipment in the event of leak is at least 25 feet to either side of a pipeline. Based on this testimony and the above cited case law, the Court agrees that 25 feet to either side of each of the pipelines, equaling an easement 88.5 feet wide⁵, is reasonable and necessary for maintenance and repair of these pipelines.

The Court further finds, however, that removal of the subject tree within the 88.5-foot-wide easement is not necessary. Mr. Murphy testified that, in the event of a leak, emergency repair work could still be performed with the oak tree present. The

⁵Because 38.5 feet exist between Texas Eastern's two pipelines, 25 feet to either side of each pipeline equals an easement that is 88.5 feet wide.

subject oak tree has a diameter of approximately 2 feet, which, according to Mr. Murphy, would obstruct repair operations by about 15 feet. With the tree present, according to Mr. Murphy, repair work would require 15 personnel, 30 hours to complete and additional machinery. Without the tree, 10 personnel and 20 hours would be needed to complete repair work.

Mr. Murphy also testified that if the subject tree were present and an emergency leak near it required its removal, it could be felled in an hour. In such an emergency, Texas Eastern would remove the tree first, then get the Bowers' approval. The Bowers do not dispute that these actions would be necessary in the event of such an emergency. The harm of destroying the subject tree which provides privacy, shade, aesthetic appeal and value to the subject property outweighs the minimal extra burden imposed upon Texas Eastern to take the tree down in the event of an emergency. Given the fact that the subject tree could be felled in an hour in the event of an emergency leak near it and that its presence would not stop other repair operations, but require only five additional personnel and ten additional hours, the Court finds that removal of the tree is not warranted.

The Court finds that the evidence presented regarding the need to remove the tree for aerial inspections does not warrant the tree's removal either. Texas Eastern performs a variety of tests to check for leaks of its pipelines. Its primary method for performing

these tests and checks is aerial surveys. Ronald Pilcher, Texas Eastern's Area Superintendent, testified that Texas Eastern conducts aerial surveys two to three times a week, weather permitting, to detect any leaks. Texas Eastern also performs walking surveys every six months, conducts corrosion surveys annually, and conducts tests through the pipes to detect any leaks every ten years. Texas Eastern's pilot, Steven Warner, testified that he conducts several weekly aerial surveys of the pipelines over the subject property. Mr. Warner flies at approximately 700 to 800 feet above the pipelines and looks out his pilot-side window to detect any objects that may endanger the pipelines and to detect leaks or any signs indicating leaks. Mr. Warner testified that the subject tree in full foliage blocks his view for a distance of about 100 to 150 feet. Mr. Bowers testified that he has stood directly under the oak tree during such aerial surveys and can see the pilot's window. Texas Eastern has conducted aerial surveys for years now, while the subject tree has remained on the Bowers' property. The Court does not find compelling evidence necessitating removal of the subject tree for purposes of detecting leaks or obstructions.

Having determined Texas Eastern's success on the merits of its claim for an 88.5-foot-wide easement, the Court now turns to the rest of the elements necessary to grant a permanent injunction. Under the standard for permanent injunction, the Court determines

that its exercise of equity jurisdiction is proper. "The predicate inquiry in evaluating whether to issue permanent injunctive relief is whether the court may properly exercise equity jurisdiction. 'Equity jurisdiction is proper if (1) plaintiff has no adequate legal remedy, (2) the threatened injury is real, not imagined, and (3) no equitable defenses preclude jurisdiction.'" Northeast Women's Center, Inc. v. McMonagle, 745 F. Supp. 1082, 1085 (E.D. Pa. 1990)(citation omitted).

Plaintiff has no adequate legal remedy and the Bowers have not presented any evidence to the contrary. An easement that allows for the proper maintenance and repair of Texas Eastern's pipelines is essential to protect the parties and public from irreparable injury and no adequate legal remedy, other than the granting of such an appropriately sized easement, exists.

Likewise, the threatened injury is real. Should an emergency occur or repair be necessary, Texas Eastern must be able to maneuver within an adequately sized area for such operations. Twenty-five feet on each side of the pipelines is necessary for such repair and maintenance.

No equitable defenses preclude jurisdiction. The Bowers claim the equitable defenses of consent, waiver, estoppel, lack of consideration and laches. These arguments fail, however, because Pennsylvania law has "rejected a prophylactic rule that would limit the grant of an easement to the grantee's subsequent agreement, use

and acquiescence." Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920, 926 (Pa. 1995). Accordingly, all three elements for equity jurisdiction are satisfied.

As discussed above, Texas Eastern has succeeded on the merits of its claim because twenty-five feet on each side of the pipelines is necessary for the "reasonable use and enjoyment" of the easement.

The balance of the equities tips in favor of injunctive relief. It is clear that 25 feet on each side of the pipelines is needed for maintenance and repair. The 88.5-foot-wide easement serves the Bowers' and the public's interest in that it allows for the pipelines to be safely maintained and repaired. Texas Eastern has satisfied all of the elements necessary for permanent injunctive relief.

Accordingly, the Court grants the Motion for Permanent Injunction, subject to the existing encroachments of the subject tree, which shall remain undisturbed, part of the Bowers' house and part of their swimming pool. An Appropriate Order follows.

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O R D E R

AND NOW, this day of January, 2002, upon consideration of Plaintiff's Complaint for Injunctive Relief (Doc. No. 1) and accompanying briefs, Defendant's responses thereto, and the permanent injunction hearing held on December 19, 2001, **IT IS HEREBY ORDERED** that Plaintiff's request for permanent injunction is **GRANTED** according to the following terms:

- (1) Plaintiff's right-of-way through Defendant's property shall be deemed to consist of a total area eighty-eight and one-half (88.5) feet wide, which includes 25 feet on each side of Texas Eastern's two natural gas pipelines, subject to the existing encroachments of the subject mature oak tree, which shall remain undisturbed, part of the Bowers' house and part of their swimming pool.
- (2) Defendant is enjoined from interfering with or obstructing Plaintiff's access to the area delineated above for purposes of locating, inspecting, maintaining and operating its pipelines. Defendants shall not interfere with or obstruct

Plaintiff's mowing and clearing operations and Plaintiff's removal and/or pruning of trees within the right-of-way, excluding the subject oak tree.

This case shall be closed for statistical purposes.

BY THE COURT:

John R. Padova, J.